

IN THE UNITED STATES COURT OF APPEAL FOR THE FOURTH
CIRCUIT

03-2176 WINTER VS. BASSETT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
CHIEF JUDGE N. CARLTON TILLEY PRESIDING

**INFORMAL BRIEF OF DEFENDANT-APPELLEE
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INTRODUCTION

This matter concerns the appeal of an order filed on 19 August 2003 in the United States District Court for the Middle District of North Carolina denying the motion of Plaintiff-Appellants Steve Winter and Pre-Rapture Solutions (hereinafter “Appellants”) to remand the case back to State Court in North Carolina, and of an order filed on 22 August 2003 denying Appellants’ motion to extend time and respond and consolidate responses, granting the undersigned Defendant-Appellee’s (hereinafter “the undersigned”) motion to dismiss on the basis of lack of personal jurisdiction. The undersigned believes, that based on the local rules of procedure, the undersigned’s motion to dismiss was properly granted, and that although other issues are presented, and indeed, included in the ruling by the lower court, the dismissal was properly granted, based solely on the local rules. The undersigned, as a *pro se* actor, believes that since he was able to understand and followed the Court’s rules, plaintiff-appellants, who had the services of a licensed attorney, did not provide a reasonable excuse for failing to follow these rules.

The undersigned most strenuously objects to statements made by Plaintiff-Appellant in his brief filed with this court. The undersigned refutes, rejects and

denies all claims made by Plaintiff-Appellant in the section titled “Statement of Facts”[sic]. The claims made by Plaintiff-Appellants with regard to the undersigned are neither factual nor true, and the undersigned objects to their inclusion in this brief as unnecessary and not appropriate, as the factual issues in the case have not been addressed, and based on the proper dismissal of the case by the lower court on the undersigned’s unopposed motion, should not be heard.

SUMMARY OF ISSUES IN THIS BRIEF

1. The District Court properly granted the undersigned’s unopposed motion to dismiss on the basis of lack of personal jurisdiction. The motion was deemed unopposed because Appellants failed to respond in opposition within the time allotted for them to do so, and failed to provide cause for leave to do so.
2. The District Court properly exercised its authority under 28 USC § 1441(c) to grant the undersigned’s motion to dismiss rather than remand it to the State court, even though the matters relative to the undersigned did not concern Federal Law.
3. Although the undersigned believes that the preceding issues are sufficient to warrant a favorable ruling by this Court, the undersigned believes that

the Lower Court's ruling in this matter was proper, with regard to statutes and case law. The District Court does not have general jurisdiction over the undersigned, because the undersigned does not have "continuous and systematic" contacts in North Carolina.

4. In addition, the undersigned asserts that Internet activities, as alleged by Plaintiff-Appellant in this case, are insufficient to give the District Court specific jurisdiction over the undersigned.

ISSUE 1: GRANTING OF DEFENDANT-APPELLEE'S MOTION TO DISMISS

The underlying matter was originally filed on 15 April 2002 in the Superior Court Division of the General Court of Justice in and for Durham County, North Carolina (hereinafter the "State Court"). The undersigned was never served in the matter (and has not been served with the original process to date), and became aware of the case only via notification by another defendant via email. The undersigned, on his own effort, obtained a copy of the suit, and chose to respond to protect his good name, rather than simply allow the case to be dismissed for lack of service.

The undersigned filed a motion to dismiss in the state Court dated 25 April 2002, and filed 26 April 2002, asserting lack of personal jurisdiction, and noting

that the undersigned had not been served in the case. This motion was timely filed, and properly served upon Plaintiff-Appellant's council at his address as noted on copies of the original suit obtained by the undersigned, and receipts showing delivery of service are in the possession of the undersigned, and will be produced if necessary.

Based on the filing date of 26 April 2002, under the most liberal reading of Local Rule 7.3(f) of the District Court¹, Appellants had until 24 May 2002 (20 days from the filing date of the undersigned's motion, not counting weekends or holidays, per the Local Rule) to respond to the undersigned's motion to dismiss. Appellants failed to do so until 17 August 2002—almost *three months* after their response was due—by filing a consolidated response, despite not being granted permission to do so by the District Court.² The undersigned's motion to dismiss was therefore, by any reasonable reading of the Local Rules and the State Courts

¹ Local Rule 7.3(f) of the District Court states:

The respondent, if opposing a motion, shall file a response, including brief, within 20 days after service of the motion (30 days if the motion is for summary judgment [...]). If supporting documents are not then available, the respondent may move for an extension of time in accordance with section (g) of this rule. For good cause appearing therefore, a respondent may be required to file any response and supporting documents, including brief, within such shorter period of time as the court may specify.

² Appellants filed a motion to extend time to respond and for a consolidated briefing schedule dated 16 July 2002, the date which the District Court had notified them by letter as the date scheduled to hear the undersigned's motion to dismiss (as well as that of Steven Buehler). This motion was denied on 22 August 2003, which granted the undersigned's **unopposed** motion to dismiss. It should be noted that Plaintiff-Appellees filed, on 17 August 2002, a consolidated response, despite not being given permission to do so. The undersigned, as a *pro se* actor, followed the courts rules. The Plaintiff-Appellees, through their **attorney** did not, ignoring the authority of the State Court.

rulings on Plaintiff-Appellants' motions, unopposed. According to Local Rule 7.3(k) of the District Court, "*The failure to file a brief or response within the time specified in this rule shall constitute a waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect...If a respondent fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice.*" Based on this rule alone, the undersigned does not believe that there can be any question as to the lower courts dismissal of the case.

Counsel for Appellants, in his motion to extend time to respond, claimed that an extended illness by an employee of his firm prevented him from filing a timely response. The undersigned believes that the District Court was correct when it stated that it was the attorney's responsibility to be fully informed as to the progress of the case, and his failure to respond was thus not excusable neglect.

Based on the above, the undersigned asserts that the courts granting of his unopposed motion by the lower court was proper and correct, and should be affirmed.

ISSUE 2: RULING ON MOTION TO DISMISS IN MATTER NOT INVOLVING FEDERAL LAW

The undersigned concedes that the claims made by Plaintiff-Appellant in this case with regard to the undersigned are based solely under the laws of the State of North Carolina, and not on Federal Law. Appellants argue, because of this, that the Federal Court erred in granting the undersigned's motion to dismiss, and should have remanded the case to the State Court.

According to Federal Statutes, "Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." [28 USC § 1441(c)]

In the case under consideration, the entire case was removed to Federal Court because claims made by Plaintiff-Appellants relating to ISPs do involve interpretation of a Federal Law, specifically the Communications Decency Act [47 USC § 230]. Removal was granted based on 28 § 1441(c), which grants the District Court authority to hear the entire case, even if only part of the claims involve Federal Law. In this case, the Court properly exercised its discretion under the aforementioned statute, granting the undersigned's unopposed motion

to dismiss, as well as granting other motions by other defendants. Some claims were remanded to State Court because, as the undersigned surmises, the remaining named defendants did not respond, as it appears that they were never properly served.

Based on the facts stated above, the undersigned believes that the court properly exercised its authority in this case, and its granting of the undersigned's motion was proper, and should be affirmed.

ISSUE 3: THE DISTRICT COURT DOES NOT HAVE GENERAL JURISDICTION OVER THE UNDERSIGNED BECAUSE HE DOES NOT HAVE "CONTINUOUS AND SYSTEMATIC" CONTACTS IN NORTH CAROLINA

The undersigned asserted in his original motion to dismiss in the State Court, that he is a resident of the State of Illinois, continuously since 1989, and prior to that (as an adult) of Connecticut, Wisconsin, Illinois and Massachusetts. In addition, the undersigned asserted that he has not, as an adult (nor to his knowledge ever,) traveled to North Carolina, nor has he engaged in any business transaction with the state, nor engaged in any business transaction with any resident of the state. The undersigned asserted that North Carolina does not have jurisdiction under its "long-arm" statute [NC Statutes 1.IIIA.6A]. The District

Court ruled in this matter, that consistent with previous rulings by the Federal Courts, that internet contact was not sufficient to give the State, and thus the District Court, jurisdiction over the undersigned in the matter at hand.

In their appeal, Plaintiff-Appellants assert that personal jurisdiction should be asserted by the court since the undersigned “intended to cause injury” to the Plaintiff-Appellants in North Carolina. But this is not the standard for jurisdiction. Plaintiff-Appellants have not asserted that the undersigned has had any “continuous and systematic” contact with North Carolina, because the facts simply do not support such an assertion.

The undersigned does not believe that creating a website or posting messages to “UseNet news groups”³ creates contact sufficient to establish general personal jurisdiction over the undersigned. Case law supports the undersigned’s contention. See the lower Court’s memorandum ruling, p 12, citing Stover v. O’Connell Associates, Inc., 84 F.3d 132, 132 (4th Cir. 1996).

Plaintiff-Appellants assert that since the undersigned knew, or should have known, that his website and messages could be read in North Carolina, that this

³ UseNet news groups are general purpose discussion groups, which are available throughout the world on a subscription basis. Individuals have no control over where their messages are read, or by whom. Access to, and distribution of, said messages lies solely under control of various individual ISP’s around the world.

establishes sufficient contact to invoke the “long-arm” statute. But again, this is not the standard established by case law, as noted by the lower court.

Based on the above facts, the undersigned believes that the lower court’s ruling that general jurisdiction does not exist is accurate and correct, and should be affirmed.

ISSUE 4: THE UNDERSIGNED’S INTERNET ACTIVITIES ARE NOT SUFFICIENT TO SUPPORT THE EXERCISE OF SPECIFIC JURISDICTION.

Plaintiff-Appellants, in order to prove their assertion of specific jurisdiction, have the burden of showing that: 1) The undersigned purposely directed his activities to North Carolina; 2) Plaintiff-Appellant’s claims arise out of these activities; and 3) the exercise of specific jurisdiction would be constitutionally reasonable, and meet the notions of fair play. [ALS Scan Inc. v. Digital Serv. Consultants Inc., 293 F.3d at 712]. Since Plaintiff-Appellants have not alleged sufficient contacts with North Carolina, they cannot show a basis for their claim that the court should exercise specific personal jurisdiction over the undersigned.

Case law supports the assertions of the undersigned that mere posting of information on the internet does not grant each and every state and country

jurisdiction over the undersigned. [Young v. New Haven Advocate, 312 F.3d 256; ALS, 293 F.3d at 711]. In ALS, the Court held that because the only direct contacts that the defendant had with the state were through general publication on a website, that this did not satisfy any part of the three-part test for specific personal jurisdiction. Since the undersigned had no contacts of any kind with North Carolina, except through general publication via the Internet, there can be no exercise of specific personal jurisdiction over the undersigned in this matter. The undersigned denies all allegations made by Plaintiff-Appellant in this case with regard to actions other than creating a website critical of Plaintiff-Appellant. Given that creation of such a website has been judged by the courts to not grant the state specific personal jurisdiction, the lower court acted properly in granting the undersigned's motion.

Plaintiff-Appellants in their brief cite Nolan, but this case is not applicable to the undersigned, since it involves individuals hired by a North Carolina resident. The undersigned has no such business contacts in North Carolina, and thus, the case cited by the Plaintiff-Appellants is not applicable in this matter. In addition, according to the court in ESAB Group, Inc., v. Centricut, Inc. 126 F.3d at 625-626, the burden is on the plaintiff to show that defendant purposefully

directed his activities into the state. Plaintiff-Appellant has not, and the undersigned asserts cannot, show this to be the case.

In addition, the undersigned believes that permitting specific jurisdiction in this case violates due process and all notions of fair-play and reasonableness. To grant jurisdiction to North Carolina in this matter would, in the opinion of the undersigned, lead to an impossible situation where every state could exercise jurisdiction over every individual who makes use of the internet. This would create an impossible situation, which would make every individual answerable to every state, no matter what their residence, no matter what the intent of their Internet activity or content was. Granting jurisdiction to North Carolina in this case would stifle communications on the Internet, as any state could, by exercising such jurisdiction, prevent discussion of any issues it chose, and make it impossible for any individual or corporation to know what was, and what was not, acceptable content. Finally, notions of fair-play should mean that the playing field is balanced between plaintiff and defendant. In this case, the burden would be so heavily against the defendants because of time, distance and unfamiliarity with the North Carolina courts that it would be unfair to them.

On the basis of the above facts, the undersigned asserts that the lower court acted properly in granting the undersigned's motion to dismiss based on lack of personal jurisdiction.

CONCLUSION: RELIEF REQUESTED

Based on the forgoing facts and arguments, the Court should affirm the District Court's granting of the undersigned's unopposed motion to dismiss based on 28 USD § 1441(c), or in the alternative, on the substantive issue of lack of jurisdiction. The undersigned believes that both situations, independent of each other, warrant that the court affirm the District Court in this matter.

Dated this 3rd day of December 2003.

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